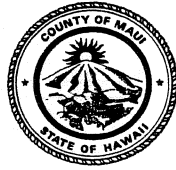


ALAN M. ARAKAWA  
Mayor

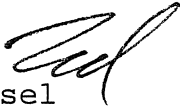


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August 15, 2006

MEMO TO: David DeLeon, Senior Executive Assistant  
Office of the Mayor

F R O M: Edward S. Kushi, Jr.   
Deputy Corporation Counsel

S U B J E C T: **MUOLEA POINT PROPERTY; LEASE TO NON-PROFIT**

This is in response to your request for legal advice, dated July 20, 2006, regarding a possible lease of a County-owned 73-acre property at Mu'olea, Hana, Maui, to Na Mamo O Mu'olea, an incorporated nonprofit organization.

QUESTION POSED:

Can an incorporated nonprofit organization that has applied for, but not yet obtained, Section 501(c)(3) status under the Internal Revenue Code,<sup>1</sup> lease county real property at less than fair market value?

DISCUSSION OF APPLICABLE COUNTY ORDINANCES AND RULES:

Section 3.40.200, Maui County Code ("MCC"), pertaining to grants of public property, states:

Concession or concession spaces and/or real property to be leased, rented, or set aside without any charge or at a charge below fair market value shall be considered a grant

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<sup>1</sup> As discussed more fully in Internal Revenue Service Publication 557 (Rev. March 2005) ("Tax-Exempt Status for Your Organization"), nonprofit status is a state law concept. Although most tax-exempt organizations are nonprofit organizations, organizing as a nonprofit organization at the state level does not automatically grant the organization exemption from federal income tax. To qualify as tax-exempt from federal income taxes, an organization must meet requirements set forth in the Internal Revenue Code.

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of public property and shall be submitted to the council as an application for grant award and considered by the council pursuant to Chapter 3.36."<sup>2</sup>

Section 3.36.090, MCC, provides that the Grants Review Committee<sup>3</sup> "shall transmit to the council any request for a grant of real property, including concessions at less than fair market value, and its recommendations with respect to the request." Pursuant to Section 3.36.090, MCC, the council may authorize the grant by resolution.<sup>4</sup>

Applicants for county grants, including applicants for grants of county real property, must be either "a profit organization incorporated under the laws of the State of Hawaii, or a nonprofit organization determined to be exempt from federal income tax by the Internal Revenue Service."<sup>5</sup> Further, a nonprofit organization seeking a grant of real property must "[p]rovide a copy of Internal Revenue Service (IRS) determination letter for an agency's tax-exempt status as described in Section 501(c)(3) of the IRS code."<sup>6</sup>

Notwithstanding the above-cited provisions, Section 3.36.150, MCC, states that "[n]othing in this chapter shall restrict the council from making grants for public purposes, provided that sections 3.36.100 to 3.36.140 shall apply."<sup>7</sup> The referenced sections 3.36.100 through 3.36.140 pertain to grant contracts, reports by recipients, monitoring and evaluation, consequences of noncompliance with contract terms, and delegation of duties.

#### CONCLUSION:

Based on the ordinances and rules cited above, a lease of property without charge or at a charge below fair market value to Na Mamō O Mu'olea would constitute a grant of real property that would

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<sup>2</sup> Section 3.40.200, MCC.

<sup>3</sup> Section 3.36.020, MCC, establishes the Maui County Grants Review Committee.

<sup>4</sup> Section 3.36.090, MCC.

<sup>5</sup> Section 3.36.040(A), MCC.

<sup>6</sup> Section 07-1-4(a)(3), Rules and Regulations Relating to Grants, Grants Review Committee, Title MC-07, Subtitle 02, Chapter 1.

<sup>7</sup> Section 3.36.150, MCC.

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be subject to review by the Grants Review Committee and to approval by the council. As a proposed recipient of a grant of County real property, and pursuant to Section 3.36.040, MCC, and the administrative rules of the Grants Review Committee, Na Mamo O Mu'olea would be required to provide confirmation of federal tax-exempt status. However, pursuant to Section 3.36.150, MCC, pertaining to the powers of council to make grants for public purposes, the absence of such tax-exempt status would not restrict the council from nevertheless authorizing a grant.

Call if further clarification and/or discussion is needed.

ESK:lk  
cc: Michele White, Legal Assistant

S:\ALL\ESK\Advisory\memo to deleon re muolea point lease.wpd

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO  
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